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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

**UNITED STATES OF AMERICA,** )  
 )  
**Plaintiff,** )  
 )  
**vs.** )  
 )  
**ARMANDO RENE PADILLA,** )  
 )  
**DANIEL THOMAS,** )  
 )  
**Defendants.** )

**No. CR 09-658-DCB (CRP)**

**REPORT AND RECOMMENDATION  
ON MOTIONS TO  
SUPPRESS EVIDENCE**

Pending before the Court are Defendants’ two motions to suppress evidence. (Docs 28, 57). Defendant Thomas filed the original motion to suppress evidence, in which Defendant Padilla later joined. (Docs 28, 57). In this motion, Defendants contend the law enforcement officer did not have the requisite reasonable suspicion to stop their vehicle. In the second motion, Defendant Padilla additionally argues that the law enforcement officer did not have consent or probable cause to search his vehicle. (Doc 57). The Government contests the motions arguing the officer did have reasonable suspicion to stop Defendants’ vehicle and also had probable cause to search the vehicle after talking to the driver, Defendant Padilla. For the reasons discussed infra., the Magistrate Judge recommends that the District Judge, after his independent review, GRANT the Motion to Suppress based on an illegal stop of Defendants’ vehicle (Doc 28) and DENY the Motion to Suppress based on lack of probable cause for the search of Defendants’ vehicle (Doc 57).

1                   **EVIDENTIARY HEARING**

2                   The Magistrate Judge held an evidentiary hearing on these motions on January 26,  
3 2010 and February 2, 2010. (Docs 69, 79). The record contains transcripts of these  
4 proceedings. (Docs 76, 84). In the evidentiary hearing, the Government produced the  
5 following witnesses to support its position:

6                   1.   Officer Leonard Henry, patrol officer and K-9 officer employed by Tohono  
7 O’odham Police Department for the last 6 years. Officer Henry is authorized to enforce  
8 both tribal and state traffic laws. He is also Defendant Thomas’s first cousin.

9                   2.   Special Agent Leander Mase, senior special agent employed by Immigration  
10 and Customs Enforcement (ICE) for the last 23 years to investigate drug and illegal alien  
11 incidents.  
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13                   **FACTUAL FINDINGS**

14                   As Officer Henry testified on direct examination, on the night of Friday, March 27,  
15 2009 he was assigned to patrol the Sells, Arizona area. Around 8:49 p.m. Officer Henry  
16 was traveling west on Highway 86 at approximately milepost 121. (TR 1/26/10, page  
17 11.) Highway 86 is a two-lane highway, one lane for eastbound traffic and one for the  
18 westbound traffic. The lanes are approximately 12-feet wide with a one-foot wide  
19 shoulder, one slight curve at milepost 120, and a speed limit of 65 mph on that part of  
20 Highway 86. A white fog line separates the driving lane from the shoulder. (TR 1/26/10,  
21 page 18.)

22                   Officer Henry described numerous potential hazards on that stretch of Highway  
23 86. The road is dark with no street lights along the road and no light from adjacent  
24 businesses. Highway 86 is an “open range”, open to cattle crossing and active pedestrian  
25 or foot traffic and hitchhiking. Officer Henry testified pedestrian traffic is especially high  
26 on Fridays. (TR 1/26/10, page 18.) As Officer Henry testified, that evening there was a  
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1 heavy westbound automobile traffic and moderate eastbound traffic. (TR 1/26/10, page  
2 18.)

3         On direct examination, Officer Henry testified he was traveling westbound at  
4 about 60 mph when he saw a vehicle driving eastbound which in Officer Henry's visual  
5 observation was traveling at a low rate of speed. Officer Henry activated his radar at  
6 approximately milepost 120, which showed that the speed of the Defendants' vehicle was  
7 54 mph (11 mph less than the maximum speed limit on this part of Highway 86). (TR  
8 1/26/10, page 13.) After noting the speed, Officer Henry testified that he slowed down to  
9 approximately 54 mph when he bypassed the Defendants' vehicle in order to get a  
10 description and the color of the vehicle. (TR 1/26/10, page 64.) As he bypassed the  
11 vehicle, he testified that he observed through the rear view mirror that the vehicle's  
12 license plate light was not on. (TR 1/26/10, page 75.) On direct examination, Officer  
13 Henry testified that he made a U-turn "once the vehicle bypassed [him]". (TR 1/26/10,  
14 page 16.) On redirect, Officer Henry testified that after he made the U-turn, it initially  
15 appeared that the license plate light was not on, but when Officer Henry caught up to the  
16 Defendants' vehicle, his own vehicle's lights were lighting up the back of the Defendants'  
17 car, so that Officer Henry was not able to determine if the license plate light was on. (TR  
18 1/26/10, page 101.) After he stopped the vehicle, Officer Henry noticed that the license  
19 plate lamp was actually on, but it was "tucked up" into the frame so that the light coming  
20 out of the lamp was dim. (TR 1/26/10, page 76.)

21         After Officer Henry made a U-turn, he sped up to catch up to the Defendants'  
22 vehicle. (TR 1/26/10, page 64.) To position his patrol car directly behind Defendants'  
23 vehicle, Officer Henry passed one car that was traveling behind the Defendants' vehicle.  
24 (TR 1/26/10, page 86.) When Officer Henry's car caught up to the Defendants' vehicle,  
25 he testified he was traveling a car to a car and a half length behind the Defendant's  
26 vehicle. (TR 1/26/10, page 65.) At that point, the Defendants' vehicle moved to the far  
27 right side of the roadway and started driving on the white fog line. (TR 1/26/10, page  
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1 19.) Officer Henry admitted on cross-examination that in his oral report to Special Agent  
2 Mase he assumed that Defendant Padilla's maneuver might have indicated his desire to  
3 allow the police vehicle to pass. (TR 1/26/10, page 65.)

4 At the evidentiary hearing Officer Henry was inconsistent in using terms to define  
5 Defendant Padilla's way of driving on the fog line. On direct, Officer Henry stated that  
6 the vehicle drove "on and along" the fog line. As pointed out on cross examination, "on  
7 and along" description was consistent with his report. But, Officer Henry expanded this  
8 description on direct. In addition to describing Defendants' vehicle as driving "on and  
9 along", he also said the vehicle "did not drive straight along the fog line, [i]t drove *on and*  
10 *over*." (TR 1/26/10, page 19.) (Emphasis added). Further, on cross-examination and  
11 redirect examination, Officer Henry testified that by saying "on and along" the fog line he  
12 meant "back and forth" and "on and over" the fog line". (TR 1/26/10, page 67-68 and  
13 99.) During cross-examination, Officer Henry admitted that he did not indicate weaving  
14 of the Defendants' vehicle in his report. (TR 1/26/10, page 67.)

15 Defendant Padilla's driving along the fog line bears significance to Officer  
16 Henry's later assertion that he stopped the vehicle, in part, because he suspected DUI.  
17 Officer Henry testified on direct examination, that given his prior experience and DUI  
18 officer training, driving at a low speed rate and driving along the fog line can both  
19 indicate DUI. (TR 1/26/10, pages 20-21.) Officer Henry asserted that Defendant  
20 Padilla's low rate of speed and his driving along the fog line were possible signs of  
21 intoxication. Officer Henry made this assertion even while he admitted on cross  
22 examination that in his oral report to Special Agent Mase he indicated that the purpose of  
23 Defendant Padilla's driving along the fog line might have been just to allow the police  
24 vehicle to pass. (TR 1/26/10, page 65.) Officer Henry also admitted on cross  
25 examination that there were numerous potential hazards on this highway that night. (TR  
26 1/26/10, page 35.) Moreover, after the stop Officer Henry found no signs of drinking or  
27 intoxication. (TR 1/26/10, page 36.)  
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1           The position of Officer Henry's patrol vehicle in relationship to the Defendants'  
2 vehicle was also discussed in the evidentiary hearing. According to Officer Henry's  
3 testimony, the Defendants' vehicle drove on the fog line for approximately 2 miles  
4 between mileposts 121 and 123. (TR 1/26/10, pages 20 and 66.) Officer Henry did not  
5 testify at any point that he was driving along the fog line too. On cross examination,  
6 Officer Henry testified he was staying on the road while following the Defendants'  
7 vehicle. (TR 1/26/10, page 90.) Defendant Thomas's counsel pointed out that if  
8 Defendant Padilla's car was on the fog line and Officer Henry's vehicle was in the  
9 driving lane, the two vehicles would be positioned at an angle to each other and not  
10 directly one behind the other. (TR 1/26/10, page 26.)

11           On direct examination Officer Henry testified that while following the Defendants'  
12 vehicle, he observed Defendant Padilla not wearing a seatbelt. Driving on a dark road,  
13 with no street lighting, Officer Henry testified he was able to observe through the rear  
14 window of Defendant Padilla's car that the seatbelt was in vertical position, as opposed to  
15 being over the driver's shoulder across his chest area. (TR 1/26/10, page 22.) These  
16 observations were made five times when five cars traveling westbound at approximately  
17 65 mph were illuminating the inside of the Defendants' vehicle with a "constant stream of  
18 light". (TR 1/26/10, page 71.)

19           Defendants' counsel inquired into the numerous distractions Officer Henry faced  
20 when allegedly observing Defendant Padilla's seatbelt. Officer Henry testified on cross  
21 examination that simultaneously with watching Defendants' vehicle driving on the fog  
22 line, he was also checking Defendants' vehicle's speed on his radar, its position relative  
23 to the road, his own speed, watching the road and the oncoming traffic, and Defendant  
24 Padilla's not wearing a seatbelt. (TR 1/26/10, pages 90-91.) These observations were  
25 made in less than a minute, given that Officer Henry was driving at 54 mph, he started  
26 following Defendants' vehicle at milepost 121 and activated his siren and lights at  
27 milepost 122, and within this period of time he had to pass one car that was traveling  
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1 behind Defendants' vehicle. Moreover, while making these observations, Officer Henry  
2 was driving within the driving lane, while Defendant Padilla was driving along the fog  
3 line, to the far right of Officer Henry's vehicle. Also, Officer Henry testified that he was  
4 observing all of the above through a windshield that had numerous visual barriers,  
5 including the radar box, the radar antenna, and the rearview mirror. (TR 1/26/10, page  
6 89.) On direct examination Officer Henry testified that in his prior experience he had  
7 made the same observations during night time in similar conditions. (TR 1/26/10, page  
8 22.)

9 In support of Officer Henry's seatbelt observations, the Government presented  
10 photographs taken in the course of a reenactment held by Officer Henry and Special  
11 Agent Mase on May 6, 2009. (Exhibits 5 through 9.) As indicated by Special Agent  
12 Mase on cross-examination, he arranged the reenactment at his own initiative because he  
13 was not sure if Officer Henry in fact saw the seatbelt as he said he did. (TR 1/26/10,  
14 pages 141-142.)

15 At the evidentiary hearing, testimony was heard regarding the limitations of the  
16 reenactment. On direct examination Officer Henry admitted that the reenactment  
17 photographs were taken in a location different than Highway 86. (TR 1/26/10, page 23.)  
18 On cross-examination, Special Agent Mase testified that the road where the reenactment  
19 took place had no fog line (TR 1/26/10, page 145.) and no center line. (TR 1/26/10, page  
20 147.) In addition, in the instant case Defendant Padilla's vehicle was driving on the fog  
21 line, while Officer Henry's car was driving in the travel lane. Thus, Defendant Padilla's  
22 car was positioned to the far right of Officer Henry's car. As confirmed by the testimony  
23 of Special Agent Mase on cross-examination, the reenactment photographs were taken so  
24 that Defendant Padilla's vehicle was located directly in front of Officer Henry's patrol  
25 car. (TR 1/26/10, page 145.)

26 Moreover, in the photographs the vehicles are stationary and lighted by a  
27 stationary car positioned in the opposite direction, so that the light illuminating the inside  
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1 of the vehicle is constant. In the instant case, both vehicles were traveling at 54 mph, the  
2 vehicles driving in the opposite direction were presumably traveling around the posted 65  
3 mph speed. The light illuminating Defendant Padilla's vehicle from inside would have  
4 been brief moving glimpses of light lasting altogether around 5 seconds. (TR 1/26/10,  
5 page 72.) Furthermore, as Special Agent Mase testified on cross-examination, the vehicle  
6 used for the oncoming traffic was an SUV; however, it is unclear from Officer Henry's  
7 testimony if the cars traveling westbound on the night of March 27, 2009 were also  
8 SUVs. (TR 1/26/10, page 149.)

9 As Officer Henry testified on direct examination, after he had observed that the  
10 Defendant Padilla was not wearing a seatbelt, he conducted a registration check and then,  
11 approximately at milepost 122, activated his emergency lamps and siren. (TR 1/26/10,  
12 page 33.) Prior to activating his lights, Officer Henry had followed Defendants' vehicle  
13 for approximately one mile. The Defendants' vehicle slowed down, drove for  
14 approximately 200 yards passing two large clearances and stopped at approximately  
15 milepost 123. (TR 1/26/10, pages 33-34.) On cross-examination Officer Henry testified  
16 that it took 10 to 15 seconds for Defendant Padilla to stop the vehicle after Officer Henry  
17 activated his police lights and siren. (TR 1/26/10, page 74.) On direct Officer Henry  
18 testified that because Defendant Padilla passed two large clearances where, in Officer  
19 Henry's opinion, Defendant Padilla could have stopped the car, his driving for 200 yards  
20 after Officer Henry activated the police lights and siren constituted another traffic  
21 violation - failure to yield to a law enforcement officer. (TR 1/26/10, page 34.)  
22 Traveling at approximately 54 mph as testified to by Officer Henry, he followed  
23 Defendants' vehicle for approximately 200 yards. (TR 1/26/10, page 72.) Defendant  
24 Padilla then stopped the vehicle at approximately milepost 123. Officer Henry testified  
25 that Defendant Padilla did not speed up or try to avoid him. (TR 1/26/10, page 74)

26 After the vehicle of Defendant Padilla stopped, Officer Henry exited the patrol unit  
27 and approached the vehicle on the driver's side. Using his flashlight he looked at the  
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1 back seat of Defendant Padilla's vehicle where he saw a large square object occupying  
2 about a half of the back seat covered by a multicolored blanket. Based on his training  
3 and field experience, Officer Henry believed that was a common way of concealing  
4 illegal drugs by smugglers. (TR 1/26/10, pages 33-34.)

5 Officer Henry approached Defendant Padilla and asked him for his driver's  
6 license, his vehicle registration, and asked him if he was "okay" to determine if the driver  
7 had been drinking any alcohol. Then, Officer Henry observed that the seatbelt was not on  
8 and asked Defendant Padilla if he knew that the law requires the driver to have the  
9 seatbelt fastened. Defendant Padilla answered, "Oh, yeah." Officer Henry explained to  
10 Defendant Padilla that he stopped the car for the low speed rate, unlit license plate,  
11 driving on and along the fog line, and not wearing a seatbelt. (TR 1/26/10, pages 35-36.)

12 On direct examination Officer Henry admitted that he did not mention the license  
13 plate to Special Agent Mase in his oral report as one the factors for the stop. (TR 1/26/10,  
14 page 77.) Officer Henry did not include the problem with the license plate and his  
15 suspicion of DUI in his report because he thought "they were unconfirmed". (TR  
16 1/26/10, page 104.)

17 Officer Henry testified that he did not see that the passenger in the car was his first  
18 cousin, Daniel Thomas up until the moment of the arrest. On cross-examination, Officer  
19 Henry admitted that based on his experience, he was supposed to identify people in cars  
20 as part of his job to secure officer's safety. Officer Henry confirmed that he saw two  
21 occupants in the Defendant Padilla's vehicle, but claimed to not notice one of occupants  
22 was his first cousin. (TR 1/26/10, page 96.)

23  
24 Once Defendant Padilla started gathering his documents, Officer Henry leaned  
25 towards the open window, inhaled the air that was coming out, stuck his face and nose as  
26 close to the window as possible and detected an odor of raw marijuana coming from the  
27 inside the vehicle. Officer Henry immediately ordered Defendant Padilla to step out and  
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1 go to the back of the car. Defendant Padilla exited the car and told Officer Henry about  
2 the registration and ownership of the vehicle.

3 At this point, Officer Henry inquired if Defendant Padilla was a member of  
4 Tohono O'odham Nation, and Defendant Padilla responded that he was a member of  
5 Pascua Yaqui Tribe. (TR 1/26/10, pages 38-39.) On redirect examination Officer Henry  
6 testified that the question of the Indian status of Defendant Padilla was not his first  
7 question because in his view it did not matter if Defendant Padilla was a member of  
8 Tohono O'odham Nation. Officer Henry believed the violations at issue were both tribal  
9 and State law violations. (TR 1/26/10, page 103.)

10 Next, Officer Henry asked Defendant Padilla for his consent to search the vehicle.  
11 Officer Henry explained that he was a K-9 officer and had a dog trained to alert to illegal  
12 narcotics. He asked Defendant Padilla if he had illegal drugs in his car to which  
13 Defendant Padilla replied that he had marijuana in the vehicle on the back seat of the car.  
14 (TR 1/26/10, pages 40-41.) Officer Henry opened the vehicle, lifted up the multicolored  
15 blanket and found a sack which he recognized as a bale with raw marijuana. Officer  
16 Henry arrested Defendant Padilla and Defendant Thomas, placed them in handcuffs, and  
17 asked Defendant Padilla if he had anything else in the trunk. (TR 1/26/10, page 42.)  
18 Defendant Padilla answered "no". (TR 1/26/10, page 42).

19 Meanwhile, the back-up officers, Officer Traviola and Elk Dreamer arrived and  
20 Defendant Padilla was placed in the caged portion of Officer Traviola's patrol unit. Then,  
21 Officer Henry exercised a K-9 sniff of the exterior of the car. (TR 1/26/10, page 43.)  
22 The dog immediately jumped in the compartment of the Defendant Padilla's car and  
23 alerted presence of illegal narcotics. Next, Officer Henry let the dog out of the car and  
24 the dog gave an alert for illegal drugs near the trunk of Defendant Padilla's vehicle.  
25 Officer Traviola assisted Officer Henry to find the key to the trunk which was eventually  
26 found in a tear of the upholstery of the seat of the vehicle. (TR 1/26/10, page 44.) Inside  
27 the trunk the officers found four large burlap sacks. Because there was a strong odor of  
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1 marijuana coming out of the trunk, Officer Henry testified on direct examination that he  
2 realized that the sacks contained raw marijuana. (TR 1/26/10, page 45.)

3       The Government contends that at that moment Officer Henry smelled the odor of  
4 marijuana he had probable cause for initiating the search of the vehicle.

## 5       **ANALYSIS**

### 6       **Reasonable Suspicion**

7       Under the Fourth Amendment, a police officer cannot stop a vehicle without a  
8 reasonable suspicion of criminal conduct at the time of the stop. *United States v.*  
9 *Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992). Reasonable suspicion is established when  
10 specific, articulable facts, together with objective and reasonable inferences, form the  
11 basis for suspecting that a person has committed or is about to commit a crime. *United*  
12 *States v. Salinas*, 940 F.2d 392, 394 (9th Cir.1991). To establish that a reasonable  
13 suspicion exists, the courts look into “totality of circumstances-the whole picture” where  
14 the government officers can refer to their past experience and training to articulate how  
15 their factual observations triggered their good-faith belief that criminal activity was afoot.  
16 *United States v. Cortez*, 449 U.S.411, 417-418 (1981). The burden of citing the “specific  
17 and articulable facts” is borne by the Government, while the burden of proof on the  
18 motion to suppress evidence lies with the Defendant. *United States v. Willis*, 431 F.3d  
19 709, 715 n. 5 (9th Cir.2005).

20       In the case in question, Officer Henry cited the following factors to support  
21 reasonable suspicion: (1) that the car was driving 10 MPH below the speed limit, (2) that  
22 the car was driving two miles on and along the fog line (a line separating the right lane  
23 from the shoulder). Officer Henry testified that these factors suggested that Defendant  
24 Padilla might be driving while intoxicated.

25       Officer Henry testified that based on his training intoxicated drivers tend to drive  
26 slower than the normal pace of traffic and also use the fog line as their guide. (TR  
27 1/26/10, page 20.) Thus, Officer Henry testified that he became suspicious of a possible  
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1 DUI violation when he observed a Defendants' car driving 11 mph below the speed limit  
2 and traveling along the fog line. However, these two factors are insufficient to form basis  
3 for reasonable suspicion.

4 First, Defendant Padilla's speed appears reasonable and prudent given the potential  
5 hazards on Highway 86 on that Friday night. Arizona traffic law sets out maximum speed  
6 limits provided, where there are specific hazards, drivers are required to drive at a lesser  
7 speed rate. A.R.S. §28-701 (B). In the instant case Highway 86 had no street lights,  
8 heavy pedestrian or foot traffic, risk of cattle crossing, and right-of-way fences along the  
9 roadway. (TR 1/26/10, page 18.) These factors represented special hazards at this part of  
10 the highway which justified the reduced speed rate of the Defendant. In addition to the  
11 special hazards, driving 54 mph in a 65 mph speed limit zone is not necessarily unlawful  
12 or unsafe driving. Furthermore, Officer Henry testified that he was traveling 60 mph  
13 along that portion of the road, only 6 mph faster than the Defendant and also below the  
14 posted speed limit.

15 Second, Defendant Padilla's decision to drive along the fog line appears to be a  
16 direct response to Officer Henry making a U-turn, passing the vehicle behind Defendants'  
17 vehicle and traveling one car to one and a half car lengths behind Defendants' vehicle.  
18 As the facts show, driving along the fog line was a prudent decision by the driver.  
19 Officer Henry started following the Defendants' car by making a U-turn and passing the  
20 car behind the Defendants. In this situation Defendants' movement to the right side of  
21 the road in order to let the officer's vehicle pass was reasonable and not indicative of  
22 criminal behavior. The most significant testimony that this was a reasonable decision was  
23 Officer Henry's statement to Officer Mase that he believed Defendant Padilla drove along  
24 the fog line to allow Officer Henry to pass his vehicle as Officer Henry had just passed  
25 the vehicle behind the Defendants' vehicle. Officer Henry did not have the requisite  
26 reasonable suspicion to stop the Defendant's vehicle for suspicion of DUI.

1 The other facts cited by Officer Henry are not indicative of criminal activity -  
2 failure to have a well-illuminated license plate and failure to wear a seat-belt - do not  
3 suggest criminal activity. Officer Henry's testimony that Defendant Padilla failed to  
4 yield for 200 yards is also not indicative of criminal activity. Per Officer Henry's  
5 testimony, Defendant Padilla stopped his vehicle within 10 to 15 seconds and he did not  
6 speed up or try to avoid Officer Henry's vehicle. Taking ten to fifteen seconds to pull  
7 over on a dark two-lane road with a narrow one-foot shoulder is not excessive or  
8 suspicious.

9 The Magistrate Judge recommends that the District Judge find that Officer Henry  
10 lacked the requisite reasonable suspicion to stop the Defendants' vehicle.

### 11 **Pre-textual Stop**

12 The Government argues that if Officer Henry lacked reasonable suspicion to stop  
13 the Defendants' vehicle, he was permitted to stop the vehicle based on traffic violations  
14 committed by Defendant Padilla.

15 When an officer has a reasonable suspicion that a traffic violation has occurred, it  
16 does not matter if the officer had some other motive for stopping the car. See *Whren v.*  
17 *United States*, 517 U.S. 806, 817-819 (1996); *United States v. Willis*, 431 F.3d 709, 723  
18 (9th Cir.2005). An officer can initiate a "pre-textual" stop and pull over a vehicle for a  
19 traffic violation when the intent is for another purpose, such as suspicion that a driver is  
20 trafficking drugs. However, for such a pre-textual stop to be valid, two requirements  
21 must be met: (1) the police officer must be able to provide "specific, articulable facts" to  
22 justify reasonable suspicion of the traffic violation, and (2) the stop should be a "run-of-  
23 the-mine" traffic violation stop. *Willis*, 431 F.3d at 723. To satisfy reasonable suspicion,  
24 the traffic violation conduct must in fact be prohibited by law. The mere belief of the  
25 police officer that a certain conduct constitutes a traffic violation - while in fact it does  
26 not - should not be taken into account when deciding whether reasonable suspicion  
27 existed. See *United States v. Lopez-Soto*, 205 F.3d 1101, 1106. To make a stop an  
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1 ordinary, “run-of-the-mine” traffic violation stop, the traffic violations must at least be  
2 mentioned by the police officers, or a traffic citation must be issued. See *United States v.*  
3 *Willis*, 431 F.3d 709, 725.<sup>1</sup> In the case in question, Officer Henry indicated four alleged  
4 traffic violations.

5 To determine whether reasonable suspicion existed for the alleged traffic  
6 violations, this Court must analyze Officer Henry’s credibility as to each of those  
7 violations. The Ninth Circuit lists seven factors a factfinder should consider in  
8 determining the credibility of a witness. The jury instruction on credibility states:

9 In deciding the facts in this case, you may have to decide  
10 which testimony to believe and which testimony not to  
11 believe. You may believe everything a witness says, or part  
of it, or none of it.

12 In considering the testimony of any witness, you may take into account:

- 13 1. the opportunity and ability of the witness to see or hear or  
know the things testified to;
- 14 2. the witness’s memory;
- 15 3. the witness’s manner while testifying;
- 16 4. the witness’s interest in the outcome of the case and any  
bias or prejudice;
- 17 5. whether other evidence contradicted the witness’s  
testimony;
- 18 6. the reasonableness of the witness’s testimony in light of all  
the evidence; and
- 19 7. any other factors that bear on believability.

20 The weight of the evidence as to a fact does not necessarily  
depend on the number of witnesses who testify.

21 Model Crim. Jury Instr. 9th Cir. 1.8 (2003). A district court cannot reject a  
22 Magistrate Judge’s credibility determination without conducting a de novo evidentiary  
23 hearing. *United States v. Ridgway*, 300 F.3d 1153, (9th Cir.2002), *aff’d United States v.*  
24 *Hernandez-Acuna*, 498 F.3d 942, 944 (9th Cir.2007). A district court can accept a

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25  
26 <sup>1</sup>Although in this case Officer Henry issued no citations for traffic violations, just like the  
27 officer in *Willis*, Officer Henry’s report contained some of the alleged traffic violations  
28 (except for the unlighted license plate) and his questions after stop were related to the traffic  
violations.

1 magistrate judge's credibility determination without conducting a de novo evidentiary  
2 hearing. *United States v. Raddatz*, 447 U.S. 667, 680 (1980).

3 The Court will address the four alleged traffic violations and Officer Henry's  
4 credibility as to each of those violations.

### 5 **Driving Below the Speed Limit**

6 Under Arizona traffic laws, a person shall not drive a motor vehicle at a speed that  
7 is less than the speed that is reasonable and prudent under the existing conditions. A.R.S.  
8 §28-701. The Government did not present any evidence that driving 54 mph in this 65-  
9 mph zone on Highway 86 was not reasonable and prudent. Officer Henry testified to  
10 significant potential hazards along Highway 86 on the night he pulled over the  
11 Defendants' vehicle. When asked if there was any special hazard, Officer Henry stated  
12 "Highway 86 at the Nation is a open range, which means there's cattle present. There's  
13 also pedestrian or foot traffic that walk along the roadway. There also is right-of-way  
14 fences along the roadway." (TR 1/29/10, page 18). When asked if there was any special  
15 hazard on that particular evening, Officer Henry stated "[i]t was a Friday night.  
16 Nighttime, there's always pedestrian or foot traffic hitchhiking." (TR 1/29/10, page 18).  
17 Officer Henry previously described Highway 86 as dark with no street lights and no light  
18 from adjacent businesses. (TR 1/29/10, page 12). He also testified that Highway 86 has a  
19 couple of curves in the section at issue in this case and traffic eastbound was moderate  
20 with traffic westbound heavy on the night in question. (TR 1,29/10, pages 12-13). Given  
21 these hazards, when asked whether Defendant Padilla's speed of 54 mph was justified,  
22 Officer Henry appears to begin to answer yes and then inexplicably answers that it was  
23 not reasonable. He testifies, "[y]es, it – for the conditions, 54 miles an hour, the amount  
24 of traffic, it was too slow for the traffic. There was a, they could get into impeding  
25 traffic, and cause a road hazard." (TR 1/29/10, page 18).

26  
27 Taking into account all the specific hazards existing at that time on that part of  
28 Highway 86 as identified by Officer Henry himself, this Court is not convinced that

1 Defendant Padilla's driving 54 mph was violating the law. In fact, it appears such a speed  
2 was reasonable and prudent. Officer Henry's testimony that 54 mph was too slow or  
3 impeding traffic is incredible given the laundry list of hazards he identified.

4 In addition to contending that Defendant Padilla's speed was in violation of  
5 Arizona law, the Government also argued that Defendant Padilla violated Tohono  
6 O'odham Nation law, which states that vehicles cannot impede even one car. The Court  
7 finds the Government's argument insincere. First, Officer Henry never cited the Tohono  
8 O'odham law that Defendant Padilla was impeding traffic. Officer Henry never made  
9 any notes that Defendant Padilla was impeding traffic and he never discussed with  
10 Defendant Padilla a concern that he was impeding traffic. Thus, no evidence was  
11 presented that Defendant Padilla was impeding traffic. The only evidence that even  
12 suggests another car was close to Defendant Padilla's vehicle was the testimony that  
13 Officer Henry passed one vehicle before traveling closely behind the Defendants' vehicle.

14 Second, the Court finds it difficult to imagine how a law stating that impeding one  
15 vehicle is a traffic violation could be enforced. Such a law could give officers the ability  
16 to pull over almost any vehicle if it had another vehicle traveling behind it. This is not  
17 logical. What is there to indicate that both cars do not want to travel at the same speed?  
18 What about two cars traveling the speed limit? Or, two family members traveling in  
19 tandem? Are those incidents violations of reasonable and prudent speed and illegally  
20 obstructing traffic? The evidence does not support a conclusion that Defendant Padilla  
21 violated any traffic law when he traveled 54 mph in a 65 mph zone on Highway 86 on the  
22 night in questions with the specific hazards identified.

### 23 **Driving Along the Fog Line**

24 Under Arizona traffic laws, when a roadway is divided into two or more clearly  
25 marked lanes for traffic, the driver should drive as nearly as practicable entirely within a  
26 single lane and shall not move the vehicle from that lane until the driver has first  
27  
28

1 ascertained that the movement can be made with safety. A.R.S. §28-729.<sup>2</sup> The words  
2 “as nearly as practicable entirely” have been interpreted by Arizona state courts so as to  
3 exclude “brief, momentary, and minor deviations outside marked lines”. See *State v.*  
4 *Livingston*, 206 Ariz. 145, 148 (2003) and *Bliss v. Treece*, 134 Ariz. 516, 519, 658 P.2d  
5 169, 172 (1983).

6 In the Ninth Circuit, touching for approximately ten seconds but not crossing the  
7 fog line does not constitute a traffic violation. *United States v. Colin*, 314 F.3d 439 (9th  
8 Cir.2002). Other courts have found no traffic violations for brief driving on the fog line  
9 when interpreting statutes nearly identical to § 28-729(1). See *United States v. Gregory*,  
10 79 F.3d 973, 978 (10th Cir.1996), *Rowe v. State of Maryland*, 363 Md. 424, 769 A.2d  
11 879, 889 (2001), *State v. Tarvin*, 972 S.W.2d 910, 912 (1998). In *Rowe* even crossing  
12 over the fog line – when made briefly – did not constitute a traffic violation justifying the  
13 stop. *Rowe v. State of Maryland*, 769 A.2d 879, at 887-88.

14 In the instant case, the Defendants’ vehicle drove along the fog line for  
15 approximately two miles according to Officer Henry. Traveling at a speed of 54 mph,  
16 Defendant Padilla drove along the fog line for approximately 2.2 minutes. According to  
17 the testimony of Officer Henry on cross-examination, the Defendants’ vehicle moved  
18 over to the fog line only after Officer Henry made his U-turn, sped up to catch the  
19 Defendants’ vehicle, passed the car traveling behind the Defendants’ vehicle and began  
20 closely following (a car to a car and half length behind) the Defendants’ vehicle. (TR  
21 1/26/10, pages 64-65). It is worth noting that Officer Henry passed the vehicle behind the  
22 Defendants’ vehicle while all three vehicles were traveling on a two-lane highway with  
23

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24 <sup>2</sup>Officer Henry testified at the evidentiary hearings that Highway 86 is a “two-lane highway,  
25 one eastbound lane, one westbound lane”. (TR 1/26/2010, page 12.) It is clear from the  
26 wording of the statute that it applies to roadways where there are two or more lanes for traffic  
27 moving in the same direction. It is unclear if this statute applies to roads where there is only  
28 one lane of traffic going in one direction, and the other lane going in the other direction.  
Nevertheless, even if it applied, the court finds the conduct of the Defendants in the instant  
case lawful and justified for the reasons set out further.



1 moderate traffic in their direction and heavy traffic in the westbound lane. Although no  
2 testimony was provided as to how Officer Henry passed the vehicle behind the  
3 Defendants' vehicle, it seems evident that either that vehicle moved to the right to allow  
4 him to pass or Officer Henry aggressively entered the westbound lane of traffic to pass.  
5 In his oral report to Agent Mase, Officer Henry told Agent Mase that Defendant Padilla  
6 driving along the fog line could have been in response to Officer Henry following closely  
7 behind the Defendants' vehicle; Defendant Padilla's attempt to allow Officer Henry to  
8 pass his vehicle as Officer Henry had just done with the vehicle behind the Defendants'  
9 vehicle. (TR 1/26/10, p 64-65).

10       The evidence does not support that Defendant Padilla's driving along the fog line  
11 was a traffic violation. While people may drive along the fog line for various other  
12 reasons such as intoxication or fatigue, those were not the reasons in this case. The actual  
13 reason in this case is evident and testified to by Officer Henry. The evidence shows, in  
14 fact, that Officer Henry was the cause of Defendant Padilla's driving along the fog line.  
15 Per Officer Henry's own testimony, Defendant Padilla moved his vehicle over to the fog  
16 line after Officer Henry made the U-turn, sped up, passed the vehicle behind Defendant  
17 Padilla's vehicle and began traveling in close proximity to the Defendants' vehicle.  
18 Moving to the right side of the road to allow an officer, who has just passed the vehicle  
19 behind your vehicle in moderate to heavy traffic, appears to this Court to be a reasonable  
20 and prudent choice and not a violation of the law.

21       Most disturbing to this Court is Officer Henry's changing description of Defendant  
22 Padilla's driving along the fog line. On cross examination, Officer Henry testified that in  
23 his initial report after stopping the Defendants' vehicle he described Defendant Padilla  
24 driving "on and along" the fog line. (TR 1/26/10, p 67). This description aligns with  
25 Officer Henry's statement to Agent Mase that Officer Henry believed Defendant Padilla  
26 could have moved over to the fog line to allow Officer Henry to pass the Defendants'  
27 vehicle. Defendant Padilla moved his vehicle over to the fog line as a conscious choice.  
28

1 Officer Henry observed Defendant Padilla move his vehicle to the right after Officer  
2 Henry exhibited driving behaviors that could have suggested he intended to pass the  
3 Defendants' vehicle - making a U-turn, accelerating, and passing, in significant traffic,  
4 the vehicle directly behind the Defendants' vehicle. It makes sense that a conscious  
5 choice, Defendant Padilla's choice to move to the right of the highway, would lead to a  
6 description of Defendant Padilla driving "on and along" the fog line.

7       The description that does not make sense to this Court and erodes Officer Henry's  
8 credibility is Officer Henry's description at the evidentiary hearing. When the prosecutor  
9 asked Officer Henry to describe how Defendant Padilla was driving on the fog line,  
10 Officer Henry stated "[o]nce the vehicle pulled to the right, it began driving on and along  
11 that fog line basically just traveling with its front and rear tire on the passenger's side just  
12 straddling the line, and then driving on and over it along it." (TR 1/26/09, page 19).  
13 Officer Henry began his answer with a description that is consistent with his initial  
14 description of Defendant Padilla making a conscious choice to move to the right of the  
15 road and driving along the fog line. But, then he goes further and adds that Defendant  
16 Padilla was driving on and over the fog line, suggesting possible weaving. The  
17 prosecutor then asked Officer Henry "[d]id the wheels perfectly follow the fog line?"  
18 (TR 1/26/09, page 19). Officer Henry answered "[n]o." (TR 1/26/09, page 19). The  
19 prosecutor continued, "[s]o was the vehicle moving in the lane and then outside of the  
20 lane crossing the fog line?" (TR 1/26/09, page 19). After an objection, the Court  
21 intervened and asked Officer Henry how the vehicle moved along the fog line. Officer  
22 Henry testified "[i]t did not drive straight along the fog line, along the fog line. It drove  
23 on and over just in a continuous motion traveling eastbound." (TR 1/26/09, page 19).

24       Officer Henry's expanded description of Defendant Padilla's driving along the fog  
25 line was further inquired into on cross examination. Officer Henry admitted on cross  
26 examination that he did not include in his report nor verbally inform Agent Mase that  
27 Defendant Padilla weaved, swerved, or veered in his driving on and along the fog line.  
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1 (TR 1/26/10, page 67). Officer Henry testified that his description on direct of Defendant  
2 Padilla driving back and forth and around the fog line was the same as his description in  
3 his report of Defendant Padilla driving on and along the fog line. The following is the  
4 dialogue between Officer Henry and Defendant Thomas's defense attorney on cross  
5 examination:

6 Q On direct you stated that [Defendant Padilla] was going back and forth kind  
7 of on and over the fog line is what, is how you described it?

8 A Yes.

9 Q You did not put that in your report?

10 A He was driving on and along the fog line, yes.

11 Q So – but you didn't indicate anything in your report about him going back  
12 and forth and kind of moving around on that fog line?

13 A That would be, to me, on and along the fog line.

14 Q So that to you that means the same thing?

15 A Yes.

16 (TR 1/26/10, pages 67-68).

17 The Court finds Officer Henry did not testify credibly about Defendant Padilla's  
18 driving along the fog line. As he admitted, in his report Officer Henry described driving  
19 on and along the fog line - a behavior indicative of a conscious choice to move to the  
20 right of a highway to allow an officer to pass. When pressed at the evidentiary hearing,  
21 Officer Henry's original description of driving basically along the fog line morphs into  
22 driving that crisscrosses the fog line and sounds like weaving and behavior that is not a  
23 conscious choice. No evidence, except Officer Henry's changing testimony, supports a  
24 description of Defendant Padilla driving back and forth over the fog line. If Defendant  
25 Padilla had driven back and forth across the fog line in a way similar to weaving, as a  
26 trained officer, this Court presumes, Officer Henry would have included that description  
27 in his report and not withheld it until the evidentiary hearing on a motion to suppress  
28 evidence.

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## **License Plate Illumination**

Officer Henry testified that before he made a U-turn, he noticed that “ the license plate light was not lit” on the Defendants’ vehicle, which was one of the reasons why he stopped the vehicle. (TR 1/26/10, page 16.)

Under Arizona law, the rear license plate must be illuminated by a white light lamp, so that the plate would be clearly legible from a distance of fifty feet to the rear. A.R.S. §28-925 (C). Thus, the lamp should not only be lit, but should be bright enough to allow seeing the license plate at a distance of fifty feet.

At the evidentiary hearing Officer Henry testified that he first noticed the license plate was unlit in his rear view mirror when he was traveling westbound and the Defendants’ vehicle was traveling eastbound. (TR 1/26/10, pages 16, 75). Officer Henry stated that the license plate was not legible from the distance of fifty feet in violation of Arizona law. (TR 1/26/10, page 16.) Officer Henry allegedly made this observation as the Defendants’ vehicle bypassed his vehicle traveling in the opposite direction while both vehicles were traveling at 54 mph. The prosecutor asked Officer Henry if he could still see the unlit license plate lamp after he made the U-turn. In response, Officer Henry testified “[f]rom the initial distance when I initially started behind the vehicle, it appeared to be not on and lit, but by the time I got up to it my lights were already lighting up the entire back...” (TR 1/26/10, pages 100-101). On cross examination, Officer Henry admitted he did not state in his report that he first observed an unlit light when he bypassed the Defendants’ vehicle. (TR 1/26/10, page 75). Officer Henry also admitted that he did not list the alleged unlit license plate light as one of the factors for stopping the Defendants’ vehicle when he provided an oral report to Agent Mase. (TR 1/26/10, page 77). Officer Henry also testified that after he stopped the Defendants’ vehicle he checked the license plate light and determined that the light was in fact lit but “tucked up” so that it appeared to Officer Henry to not be lit. (TR 1/26/10, page 76).

1       The Court does not find Officer Henry's testimony regarding the license plate light  
2 credible. Most problematic for the Court is Officer Henry's assertion that he first made  
3 this observation while traveling in the opposite direction of the Defendants' vehicle.  
4 While both cars were traveling, per Officer Henry's testimony at 54 mph, Officer Henry  
5 asks this Court to believe he saw that a license plate light was not lit to a distance of 50  
6 feet as required by Arizona law. Traveling at that speed in opposite directions, Officer  
7 Henry would have had only a split second to view through his rearview mirror the alleged  
8 license plate light violation. It is not believable that he made this observation. In fact, the  
9 license plate light was actually lit. Furthermore, Officer Henry testified that after making  
10 the U-turn, while he was accelerating to catch up to the Defendants' vehicle and while he  
11 was passing the vehicle behind the Defendants' vehicle, Officer Henry was somehow able  
12 to observe the license plate light not on before his headlights shone to brightly on the  
13 back of the Defendants' vehicle. Again, this is not feasible. Officer Henry's credibility is  
14 further undermined by the fact that he did not list an unlit license plate light as one of the  
15 reasons he stopped the Defendants' vehicle when he was providing his report to Agent  
16 Mase.

### 17       **Seatbelt Violation**

18       Officer Henry testified that he stopped the Defendants' vehicle, in part, because he  
19 observed that the driver, Defendant Padilla, was not wearing a seatbelt. Under Arizona  
20 law, a peace officer shall not stop a person operating a motor vehicle on a highway  
21 without wearing a seatbelt, unless the peace officer has reasonable cause to believe that  
22 there is another alleged violation of a motor vehicle law of Arizona. A.R.S. §28-909(C).  
23 Thus, not wearing a seatbelt does not constitute a primary reason for stopping a vehicle.

24       Assuming that all other alleged traffic violations did not constitute violations under  
25 Arizona law, Officer Henry was not entitled to stop the Defendants' vehicle solely  
26 because Defendant Padilla was not wearing a seatbelt in violation of Arizona law.  
27 However, since the vehicle was stopped within the territory of the Tohono O'odham  
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1 reservation, the Government argues that the traffic laws of the Tohono O’odham tribe are  
2 applicable. According to Section 1001 of the Tohono O’odham Traffic Code (Title 23 of  
3 the Tohono O’odham Code), a law enforcement officer may stop a vehicle and issue a  
4 citation for failure to wear a seatbelt “upon having reasonable cause to believe there is a  
5 violation”. Section 1001 (C) of the Tohono O’odham Traffic Code.

6 Counsel for the parties dispute whether tribal law, specifically a Tohono O’odham  
7 seatbelt law, can apply to non-tribal members and whether Officer Henry had an  
8 obligation to make an initial inquiry into the tribal status of Defendants after he stopped  
9 their vehicle. (See Doc 28, p 5-6; Doc 37, p 11-13). Both sides cite a recent Ninth  
10 Circuit case and a relatively recent United States Supreme Court case in support of their  
11 positions. *See Bressi v. Ford*, 575 F.3d 891 (9th Cir.2009), *United States v. Lara*, 541  
12 U.S. 193 (2004). Neither case involved a routine traffic stop.

13 *Bressi* addressed a DUI roadblock on a state highway crossing the Tohono  
14 O’odham Nation Indian Reservation. 575 F.3d at 893. *In dicta*, the Court opined that a  
15 practical approach should be taken in considering tribal law enforcement officers’ ability  
16 to stop vehicles for violating tribal law. Because a tribal officer initially has no way of  
17 knowing whether a driver is an Indian or non-Indian the Court suggested “[t]he solution is  
18 to permit the officer to stop the vehicle to determine first whether or not the driver is an  
19 Indian.” *Bressi*, 575 F.3d at 896. The Court suggested such an approach would permit  
20 tribal officers to exercise tribal law against Indians and that a brief stop would be a  
21 relatively minor intrusion or inconvenience to a non-Indian motorist. *Bressi*, 575 F.3d at  
22 896. It is unclear from the *dicta* in *Bressi* whether a stop is unconstitutional if the tribal  
23 officer asks about tribal status after other questions or assumes tribal status.

24 The second case cited by the parties addresses a criminal assault of a federal  
25 officer occurring in Indian country. *Lara*, 541 U.S. at 196. In *Lara*, the defendant was a  
26 nonmember Indian who was prosecuted for the assault under tribal law of another Indian  
27 Nation and then later prosecuted in federal court. *Lara*, 541 U.S at 196-197. As part of  
28

1 its holding, the Court determined tribes could prosecute nonmember Indians. *Lara*, 541  
2 U.S. at 210. Thus, the Government in the case before this Court contends the Tohono  
3 O’odham Nation had full authority to stop Defendant Padilla’s car and enforce the  
4 seatbelt violation against him as he is a member of the Pascua Yaqui Tribe.

5 As a member of the Pascua Yaqui Nation, it is clear that Tohono O’odham tribal  
6 jurisdiction applies to Defendant Padilla. 25 U.S.C. § 1301. However, the evidence  
7 shows that Officer Henry made no initial attempt to determine if Defendant Padilla was  
8 subject to the “courts of Indian offenses.” *Id.* The testimony showed that Officer Henry  
9 did not inquire into tribal membership of either Defendant until he asked numerous other  
10 questions and was concluding his conversation with them. The Court will not address  
11 this constitutional issue as there is another dispositive nonconstitutional ground available.  
12 *City of Los Angeles v. County of Kern*, 581 F.3d 841, 846 (9th Cir.2009) (“a federal court  
13 should not decide federal constitutional questions where a dispositive nonconstitutional  
14 ground is available”).

15 The critical issue, which this Court will address, is whether Officer Henry had  
16 reasonable cause to believe Defendant Padilla was not wearing a seatbelt before the stop  
17 was made. This issue rests on the credibility of Officer Henry and the evidence presented  
18 at the evidentiary hearing. The Court finds Officer Henry’s testimony incredible and not  
19 supported by the evidence offered.

20 Officer Henry testified that he made five separate observations that Defendant  
21 Padilla was not wearing a seatbelt. (TR 1/26/10, page 71). The facts show there are  
22 numerous reasons why it is not feasible that Officer Henry made these observations.  
23 First, these observations were made in less than a minute, given the facts as testified to by  
24 Officer Henry - that both vehicles were traveling at 54 mph, that Officer Henry started  
25 following Defendants’ vehicle at milepost 121 and activated his siren and lights at  
26 milepost 122, and that within this period of time Officer Henry passed one car that was  
27 traveling behind Defendants’ vehicle. Second, these observations were allegedly made  
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1 solely by the light cast from five vehicles traveling in the opposite direction, westbound,  
2 along the highway. (TR 1/26/10, page 71). When questioned about the light on cross  
3 examination, Officer Henry stated that the light from the oncoming traffic cast a “constant  
4 stream of light” into the interior of the Defendants’ vehicle. (TR 1/26/10, page 71).  
5 Third, while making these observations, Officer Henry was driving within the driving  
6 lane, while Defendant Padilla was driving along the fog line, to the far right of Officer  
7 Henry’s vehicle. Thus, Officer Henry would have needed to view (from a significant  
8 angle) the driver’s side of the Defendants’ vehicle while that vehicle was traveling to the  
9 far right of his own vehicle. Fourth, Officer Henry faced numerous distractions, visual  
10 and otherwise, while he allegedly made these observations. Officer Henry testified on  
11 cross examination that while making the seatbelt observations, he was simultaneously  
12 watching Defendants’ vehicle driving on the fog line, checking Defendants’ vehicle’s  
13 speed on his radar, monitoring his own speed, watching the road and watching the  
14 oncoming traffic. (TR 1/26/10, pages 90-91.) Also, Officer Henry testified that he was  
15 observing all of the above through a windshield that had numerous visual barriers,  
16 including the radar box, the radar antenna, and the rearview mirror. (TR 1/26/10, page  
17 89.) Fifth, during this same one minute, Officer Henry testified that he conducted a  
18 registration check on the Defendants’ vehicle. (TR 1/26/10, page 33).

19 In a minute’s time, in light cast only by oncoming traffic, at a sharp angle, with  
20 numerous visual distractions, while making other observations, and conducting a  
21 registration check of the Defendants’ vehicle it is not credible that Officer Henry actually  
22 saw Defendant Padilla not wearing his seatbelt.

23 The reenactment photographs offered by the Government do not convince this  
24 Court that Officer Henry saw what he now claims. At the evidentiary hearing, numerous  
25 testimony was heard regarding the limitations of the reenactment. First, the photographs  
26 were not taken on Highway 86; in fact, they were taken on a road that does not even have  
27 a fog line or a center line. (TR 1/26/10, pages 23, 145, 147). Second, the vehicles were  
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1 positioned one directly in front of the other rather than the actual position of Officer  
2 Henry's vehicle in the driving lane and the Defendants' vehicle to the far right on the fog  
3 line. (TR 1/26/10, page 145). Third, the photographs were taken with stationary  
4 vehicles, not vehicles traveling approximately 65 mph, as Officer Henry testified the  
5 oncoming traffic was traveling. (TR 1/26/10, pages 70, 72). Thus, this Court has no way  
6 of discerning how the light from oncoming traffic would appear in the interior of the  
7 Defendants' vehicle as the oncoming traffic bypasses the Defendants' vehicle. While  
8 Officer Henry testified that it was a constant stream of light from oncoming traffic, he  
9 also testified that the five cars illuminating the Defendants' vehicle were all about a car  
10 length behind each other. (TR 1/26/10, page 71). Thus, Officer Henry described the light  
11 illuminating the interior as "so it'd be about a second [after the first vehicle], the second  
12 vehicle another second, so just a steady stream of cars behind each other." (TR 1/26/10,  
13 page 71). When asked how long Officer Henry observed the driver while each car was  
14 illuminating the interior, Officer Henry testified he viewed the driver and lack of a  
15 seatbelt for about five seconds. (TR 1/26/10, page 72). Thus, unlike the reenactment  
16 photographs, Officer Henry did not have a steady stream of light but at most, had only  
17 five second flashes of light into the interior of the Defendants' vehicle. Furthermore, as  
18 Special Agent Mase testified on cross-examination, the vehicle used for the oncoming  
19 traffic was an SUV; however, it is unclear from Officer Henry's testimony if the cars  
20 traveling westbound on the night of March 27, 2009 were also SUVs. (TR 1/26/10, page  
21 149.)

22       The Government need only show one traffic violation for a legitimate pretextual  
23 stop. As discussed above, there was no license plate light violation, speed violation,  
24 crossing the fog line violation or failure to pull over in response to the emergency lights.  
25 That Defendant Padilla in fact violated the seatbelt requirement is undisputed. What is  
26 disputed is whether Officer Henry knew about the violation before or after the stop. The  
27 timing of his knowledge rests solely on Officer Henry's credibility.  
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1 As the investigating officer in this case, Officer Henry has an interest in the  
2 outcome of the case. As discussed in detail above, in many instances, Officer Henry's  
3 testimony concerning the license plate light, speeding, crossing the fog line and failure to  
4 pull over was not credible and not consistent with his prior written and verbal statements  
5 and not consistent with the evidence. On those four violations, Officer Henry simply was  
6 not credible.

7 When Officer Henry testifies about the seatbelt, his credibility does not start with a  
8 clean slate. Rather, Officer Henry's willingness to stray from the facts on these related  
9 issues leads to the conclusion that he would be similarly unconstrained by the actual facts  
10 when testifying about the seatbelt. This Court finds that Officer Henry's testimony was  
11 not credible. As such, the Government has not satisfied its burden of proof that Officer  
12 Henry observed the seatbelt violation, the silhouette of the belt hanging vertically, prior to  
13 stopping the vehicle driven by Defendant Padilla.

14 The Magistrate Judge recommends that the District Court grant the motion to  
15 suppress evidence based on lack of reasonable suspicion for the traffic stop. Officer  
16 Henry did not have reasonable suspicion that any criminal activity was afoot when he  
17 stopped the Defendants' vehicle. Furthermore, Officer Henry's assertions that he stopped  
18 the Defendants' vehicle for independent traffic violations are not credible and are not  
19 supported by the evidence presented at the hearing.

### 20 **Probable Cause**

21 If the original stop in this case was justified, then the question is whether the  
22 search conducted after the stop was legal. Law enforcement officers are permitted to  
23 search a vehicle without a warrant if probable cause for the search exists. Probable cause  
24 exists when there is a set of facts within knowledge of the officers sufficient to make a  
25 reasonable and prudent person believe that an offence is being committed. See *Carroll v.*  
26 *United States*, 267 U.S. 132 (1925); *Brinegar v. United States*, 338 U.S. 160 (1949);  
27 *Husty v. United States*, 282 U.S. 694 (1931).  
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1 In the case in question there is no doubt that Officer Henry had probable cause to  
2 search the Defendants' vehicle after he smelled an odor of marijuana. Officer Henry  
3 testified that he smelled the odor of marijuana as he was standing at the driver's side door  
4 while Defendant Padilla was gathering his documents. Officer Henry explained that he  
5 got his face and his nose as close as possible to the window of the vehicle, and, being well  
6 familiar from previous experience with the odor of illegal narcotics, he was able to  
7 recognize that the odor coming out of the vehicle was that of marijuana. That alone gave  
8 Officer Henry a probable cause to believe that a crime was being committed. *U.S. v.*  
9 *Leazar*, 460 F.2d 982, 984 (9th Cir.1972); *Fernandez v. U.S.*, 321 F.2d 283, 287 (9th Cir.  
10 1963).

11 Even if Officer Henry did not have probable cause to search the vehicle at that  
12 time, he definitely had probable cause when Defendant Padilla told Officer Henry that he  
13 had marijuana in his backseat of the vehicle. (TR 1/26/10, pages 38-41.). See *U.S. v.*  
14 *Smith*, 790 F.2d 789, 792 (9th Cir.1986) (where the statement of codefendant which  
15 indicated that counterfeiting materials were located in defendant's jeep provided probable  
16 cause to search the jeep).

17 The Magistrate Judge recommends that the District Judge deny the motion to  
18 suppress evidence based on lack of probable cause.

### 19 **RECOMMENDATION**

20  
21 The Magistrate Judge recommends that the District Judge, after his independent  
22 review, GRANT Defendants' Motion to Suppress Evidence based on lack of reasonable  
23 suspicion to stop the Defendants' vehicle (Doc 28) and DENY Defendant Padilla's  
24 Motion to Suppress Evidence based on lack of probable cause to search the Defendants'  
25 vehicle (Doc 57).

26 Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party may serve and  
27 file written objections within fourteen days of being served with a copy of the Report and  
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1 Recommendation. If objections are not timely filed, they may be deemed waived. The  
2 parties are advised that any objections filed are to be identified with the following case  
3 number: **CR 09-658-DCB**.

4 DATED this 3<sup>rd</sup> day of March, 2010.

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7 **CHARLES R. PYLE**  
8 **UNITED STATES MAGISTRATE JUDGE**  
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